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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
EUGENE DIVISION

ASCOT SPECIALTY INSURANCE
COMPANY a/s/o MCCLORY FAMILY
TRUST DATED d/b/a Airport Self Storage,
Plaintiff,
v.
WALMART, INC.,
Defendant.

NO.
COMPLAINT

COMES NOW Plaintiff, Ascot Specialty Insurance Company a/s/o McClory Family Trust DBA: Airport Self Storage, and for causes of action against the Defendant above-named, states, alleges and avers as follows:

I. PARTIES AND JURISDICTION

1.1 Ascot Group (Ascot) was and is a Rhode Island corporation, licensed to do business in Oregon. Ascot provided insurance to McClory Family Trust d/b/a Airport Self Storage.

1.2 At all times relevant, Defendant Walmart, Inc., (“Walmart”), was and is a Delaware corporation with its principal place of business in Bentonville, Arkansas. Walmart transacts business and has retail stores in Oregon, including a store in Salem, Oregon.

II. BACKGROUND FACTS

2.1 At all relevant times, Plaintiff Ascot insured property owned by its insured and located at 2142 Turner Road SE, Salem, Oregon.

2.2 At all relevant times, Defendant Walmart was and is in the business of selling retail products to the public.

2.3 Walmart is an American retail corporation that operates a chain of supercenters, discount department stores, and grocery stores throughout the world. There are over 5,000 Walmart stores in the United States alone.

2.4 Walmart owned, operated, and maintained a retail store in Salem, Oregon.

2.5 Walmart sells tens of thousands of different products in its retail stores, ranging from jeans and jewelry to firearms and hunting knives.

2.6 Many products sold at Walmart, like guns, knives, cold medicines, alcohol, and cigarettes, pose inherent dangers, or foreseeable risks of harm, to shoppers, customers, and the public. Walmart knows that such products pose inherent dangers, or foreseeable risks of harm, to shoppers, customers, and the public.

2.7 Walmart protects against the inherent dangers, or foreseeable risks of harm, by, for instance, placing certain items in locked cases accessible only by appropriate store employees (*e.g.*, firearms or hunting knives) or putting locking mechanisms on certain products (*e.g.*, hard liquor). These actions deter theft and control access to the products. For any person looking to buy these products, the person must request assistance of an appropriate Walmart employee to unlock the locked case or to remove the locking mechanism on the product.

2.8 These safety measures are intended to (1) deter and prevent theft and (2) deter and prevent these products from being accessed and used by people who have a propensity for criminal activity.

1 2.9 At most, if not all, Walmart stores, Walmart sells Orion flare guns on an open
2 display or shelf accessible to any person who enters a Walmart store. Orion flare guns come
3 equipped in the package with ammunition (or flares). The Orion flare guns are not placed
4 behind a locked case or with a locking mechanism on the product. As a result, anyone who
5 enters a Walmart store can easily access and steal an Orion flare gun.

6 2.10 Walmart knows that flare guns are a class of products that pose inherent
7 dangers, or foreseeable risks of harm, to shoppers and the public. The instruction manual for
8 Orion flare guns warn that these guns “ARE NOT TOYS AND MISUSE CAN CAUSE
9 DEATH/SERIOUS INJURY.” The manual also warns that “FLARES present unique hazards
10 because they burn at very high temperature and are manufactured with energetic materials.
11 (A copy of the Orion safety manual is attached to this Second Amended Complaint.) Further,
12 the manual notes that misuse can subject the user to civil or criminal liability under local
13 firearm laws. By their very nature, Orion flare guns, when not used for their limited purpose,
14 can cause death, serious injury, and property damage. Walmart knew that flare guns could
15 cause fire and resulting property damage and that flare guns could be stolen and discharged in
16 or around a Walmart store.

17 2.11 A simple Google search confirms that, over at least 10 years, there have been
18 numerous incidents where a person stole and discharged a flare gun in or at a Walmart,
19 causing property damages and, in some cases, personal injury.

20 2.12 Walmart failed to take any reasonable preventative measures to avoid the
21 foreseeable risk of harm that an Orion flare gun could be accessed and/or stolen from its store
22 and discharged. A reasonable person can anticipate that a foreseeable risk created by
23 Walmart’s failure to lock or secure an Orion flare gun prior to sale is that the flare gun will be
24 stolen, misused, and discharged potentially causing serious injury to shoppers, the public, and
25 neighboring properties.
26

2.13 The risk of harm that occurred here—the burning down of Plaintiff’s property—resulted from Walmart’s unreasonable conduct in displaying Orion flare guns in an open display or shelf accessible to any person who enters a Walmart store, where an Orion flare gun could easily be stolen and misused. As alleged above, Walmart knew that misuse of a flare gun could result from displaying the flare gun on an open shelf without any control over access and/or any deterrent measures, such as placing the flare gun in a locked case or selling the flare gun with a locking mechanism. By failing to take any such access and deterrent measures, Walmart unreasonably created the anticipated and foreseeable risk of harm that befell Plaintiff’s insured.

2.14 At all relevant times, Walmart sold Orion manufactured flare guns at Walmart stores, including the Salem, Oregon Walmart. Orion flare guns look much like an ordinary handgun (and their basic operation is similar to a handgun). A picture of an Orion flare gun is reproduced below:



2.15 Although Orion flare guns meet the definition of firearms and handguns as defined by ORS 166.210, they are not classified as firearms in Oregon.

2.16 Like firearms and handguns, flare guns are inherently dangerous. Flare guns contain explosive, dangerous chemicals and, when discharged, release a combustible projectile that can cause fire.

1 2.17 Because Walmart failed to lock or secure Orion flare guns in the Salem store,
2 on or about May 3, 2021, a person shoplifted an Orion flare gun from the Walmart store.

3 2.18 On or about May 3, 2021, the Orion flare gun stolen from Walmart was
4 misused and discharged in the Walmart parking lot. The burning flare landed on a
5 neighboring building owned by Ascot's insured and located at 2142 Turner Road, SE, Salem,
6 Oregon.

7 2.19 The flare caused a fire and resulted in \$1,374,650 in property damage.

8 **III. FIRST CAUSE OF ACTION-NEGLIGENCE (Walmart)**

9 3.1 Plaintiff incorporates by reference the allegations in the previous paragraphs as
10 if fully set forth herein.

11 3.2 At all times relevant, Defendant Walmart had a duty to use reasonable care in
12 the sale, marketing and display of the Orion flare gun.

13 3.3 Although Orion flare guns meet the definition of firearms as defined by ORS
14 166.210, flare guns are not classified as firearms in Oregon. Orion flare guns have the
15 inherently dangerous characteristics of firearms but are not subject to the same restrictions on
16 sale.

17 3.4 Prior to the Orion flare gun's being shoplifted, Defendant Walmart knew or
18 should have known that flare guns are inherently dangerous, that flare guns have been
19 accessed and stolen from Walmart and misused, and that flare guns have caused damage or
20 injury to persons and property. The failure to lock or otherwise secure the Orion flare gun
21 created a foreseeable risk of harm, including, but not limited to, a risk that the product would
22 be stolen and misused to cause a fire or injury to others, including neighboring property
23 owners.

24 3.5 Prior to the Orion flare gun's being shoplifted, Defendant Walmart knew or
25 should have foreseen that a negligently displayed and unsecured Orion flare gun could be
26 shoplifted. If the Orion flare gun is shoplifted, the inherently dangerous product is in the

1 possession of a person willing to engage in criminal activities. Because Walmart failed to
2 lock and secure the inherently dangerous product, and because the ordinary requirements for
3 sale of a firearm do not apply, it is foreseeable that a person could easily access, steal,
4 possess, and misuse the Orion flare gun. It is also foreseeable that a person would steal an
5 unlocked or unsecured flare gun and use it to cause a fire to a neighboring property.

6 3.6 The fundamental purpose of securing and locking flare guns prior to sale is to
7 control access and prevent inherently dangerous flare guns from stolen and foreseeably
8 misused.

9 3.7 Walmart failed to take any precautions to prevent the theft of the Orion flare
10 gun to protect the public, including Plaintiff's insured, from the foreseeable risk of harm
11 created by Walmart's failure to secure and/or lock the Orion flare gun.

12 3.8 Defendant Walmart breached its duties by:

- 13 a. Failing to lock the Orion flare gun;
14 b. Failing to secure the Orion flare gun behind a counter;
15 c. Failing to require a store employee to retrieve the product from a storage
16 area after a sale; and/or
17 d. Failing to display the Orion flare gun in a locked case or display cabinet.

18 3.9 As a direct and proximate cause of Defendant Walmart's negligence,
19 Plaintiff's insured sustained damages to its property.

20 3.10 As a result of this loss, Plaintiff's insured made claims to Plaintiff, who in turn
21 issued payments pursuant to its insured's insurance policy.

22 3.11 As a direct and proximate result of Walmart's negligence, Plaintiff incurred
23 damages in an amount to be proven at trial.

24 ///

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26 /

IV. PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for the following relief:

1. Judgment against the Defendant in the amount of \$1,374,650, together with pre-judgment and post-judgment interest;
2. An award of Plaintiff's costs and disbursements herein, including a reasonable attorney's fee;
3. Such other and further relief as the court deems just and equitable.

DATED this 3rd day of March, 2023.

s/ Eric C. Hanson

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The Brightest Name in Safety

SAFETY MANUAL

(12-GA. & 25 mm Launchers, Aerial Flares & Handhelds)

This Safety Manual contains warnings, use, storage and inspection instructions for Orion signal launchers (12-Gauge and 25 mm), and flares (aerial and handheld). Please read this Safety Manual carefully before using or storing signals and retain for future reference.

Remember, Flares Expire 42 Months After Manufacture Date...

Check Your Flare Dates Every Season!

WARNING: THESE ARE NOT TOYS AND MISUSE CAN CAUSE DEATH/SERIOUS INJURY. KEEP OUT OF REACH OF CHILDREN. BURNING AERIAL FLARES LAUNCHED AT HIGH VELOCITY. HANDHELD FLARES PRODUCE HOT FLAME AND/OR DENSE SMOKE.

Please read the following safety manual thoroughly before storing or using your signaling products.

Aerial and Hand-Held Flare Instructions

Principles of Signaling

The purpose of distress signaling is simple: (i) to attract attention, and (ii), to pinpoint your location to guide the responding party to your craft. Remember, nothing can happen until someone's attention is attracted. The most effective distress signals for attracting someone's attention are aerial flares because they are moving, spectacular and cover a large sighting area. Once help is on the way, hand-held red signal flares, orange smoke signals and orange distress flags serve as beacons for rescuers to pinpoint your position and keep them on course.

If You are in a Signaling Situation:

1. Conserve your signals until you are reasonably sure of being detected. Wait until you see or hear a vessel or aircraft before using "one-time" signals.
2. Stay with the boat if it is safe to do so. A boat is easier to spot than a swimmer.
3. Above all, familiarize yourself with your signals before you leave shore. Time is important in any emergency and shouldn't be spent reading instructions!

Replacement & Disposal Instructions

Marine distress signals are date coded and must be replaced every 42 months to meet Coast Guard requirements. If your flares or smoke signals have expired (or will expire) during the boating season, you must replace them. It's the law!

To dispose of expired marine pyrotechnic distress signals, Orion recommends the following methods:

- Donate expired flares to Coast Guard Auxiliary or Power Squadron for use in their training classes.
- Ignite hand-held signal flares on land in a safe area, much the same as highway flares would be ignited.
- Contact a local law enforcement or fire protection agency for their advice on proper visual distress signal (VDS) disposal.
 - Retain flares for back-up use to expand signaling time in the event of an emergency.
 - **Never** jettison flares overboard.
- **Never** activate marine flares in non-emergency situations over regulated waters.
- **Never** dispose of flares in household trash.

IMPORTANT SAFETY INFORMATION

FLARES present unique hazards because they burn at a very high temperature and are manufactured with energetic chemicals (see SDS at www.orionsignals.com/sds-sheets.html).

Annual Signal Inspection

Before each boating season, check the dates and the condition of your signaling equipment as instructed below. If signals are expired or will expire during the season, replace them immediately!

Test Your Launcher

We recommend that prior to each boating season, every signal launcher be inspected to be sure it is fully functional. To do so:

1. BE SURE THE FIRING PIN ON LAUNCHER IS NOT BENT.
2. Open the barrel and insert a 12-Gauge or 25 mm Orion, as applicable, signal into the barrel.
3. Be sure that the signal is fully inserted into the barrel.
4. Close the launcher barrel.

If the barrel snaps fully shut, it is in good operating order. Open the barrel, **REMOVE THE SIGNAL AND SAFELY STORE IT WITH YOUR OTHER SIGNALS.**

If the barrel does not fully close, DO NOT FORCE IT. Check that the signal is pushed all the way into the barrel. If this does not help, **REMOVE THE SIGNAL AND SAFELY STORE IT WITH YOUR OTHER SIGNALS.** Contact Orion for replacement instructions. **DO NOT STORE LAUNCHER LOADED.**

Check Your Handheld Flares

Check that moisture, mishandling, or improper storage has not corrupted the flare body. These flares are waterproof but extreme conditions can have a negative impact on their performance and shelf life.

ACQUAINT YOURSELF WITH OPERATION OF SIGNALING EQUIPMENT

Prior to each season and before an emergency occurs, read the warnings and instructions on all your signals. Family and visiting boaters, not including children, should also be made aware of location, warnings and use instructions of all safety gear.

FIRST AID

Skin: wash with soap and water if flare powder contacts skin

Eyes: flush with plenty of water if flare powder contacts eyes

Inhalation: seek fresh air if smoke or fumes from burning flares has been inhaled (avoid breathing fumes)

IF ANY IRRITATION EXISTS AFTER INITIAL FIRST AID (RESPIRATORY, SKIN, OR EYES), CONSULT A PHYSICIAN.

SDS CAN BE REVIEWED AT WWW.ORIONSIGNALS.COM/SDS-SHEETS.HTML

Instructions For Loading, Launching & Handling

ORION LAUNCHERS ARE DESIGNED TO BE USED WITH ORION SIGNALS ONLY. USE OF ANY OTHER SIGNAL OR SHELL IS DANGEROUS AND VIOLATES ALL CLAIMS AND WARRANTIES. ORION SIGNALS MAY ONLY BE FIRED FROM ORION LAUNCHERS.

The Orion 12-Gauge launcher is designed to fire all Orion 12-Gauge signals (red or white), including single and twin aerial signals. The Orion 25 mm launcher is designed to fire Orion 25 mm aerial signals, and with the use of a 12-Gauge converter, can also fire all versions of Orion 12-Gauge aerial signals.

INSTRUCTIONS FOR SAFE AND EFFECTIVE USE OF ORION 12-GAUGE & 25mm LAUNCHERS



STEP 1

For most effective use, fire only after sighting potential rescue vessel

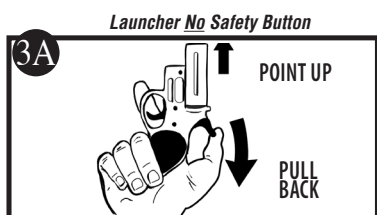


STEP 2 - AFTER SIGHTING POTENTIAL RESCUE VESSEL:

Break launcher barrel open, insert Orion 12-Gauge aerial flare and close launcher¹

25mm LAUNCHER

Depress blue plastic button on side of launcher to open barrel. Insert 25mm signal or converter and 12-Gauge signal. Close launcher.¹ Hold launcher above eye level, point straight up, cock



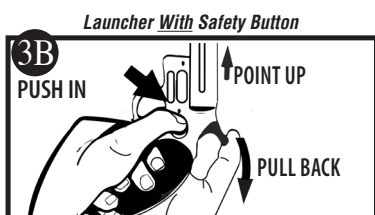
Launcher No Safety Button

POINT UP

PULL BACK

STEP 3A - PREPARING TO FIRE - HOW TO COCK HAMMER

With fingers off trigger, hold launcher above head with barrel pointed up, pull hammer back until it cocks (locks in place).



Launcher With Safety Button

PUSH IN

POINT UP

PULL BACK

STEP 3B - PREPARING TO FIRE - HOW TO COCK HAMMER

With fingers off trigger, hold launcher above head with barrel pointed up. Using left hand push in white button on launcher. At same time, use right thumb to pull hammer back until it cocks (locks in place).



STEP 4 - LAUNCHING/FIRING FLARE

Verify launcher barrel is pointed up (as in picture above). Place finger on trigger and squeeze to fire flare.² Repeat with second signal.

¹ If barrel does not close, DO NOT FORCE. Check that signal is pushed all the way in.

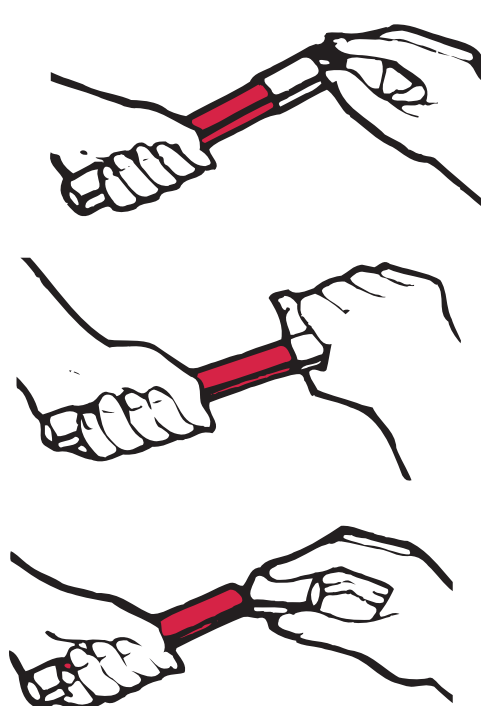
If barrel will not close fully, carefully remove signal and try another. Repeat Step #2

² If a signal does not fire after following these instructions and the trigger has been squeezed, DO NOT IMMEDIATELY OPEN THE LAUNCHER. While rare, a hang-fire (delayed launch after squeezing the trigger) can be very dangerous. Point the launcher overboard towards the water, wait at least 5 seconds, then open the launcher and replace signal. Repeat Step #2.

Hand-Held Red Signal Flares and Orange Smoke Signals

Use Instructions

1. Grasp bottom of flare below holding line on label. Remove black lid on cap.
2. Twist cap, remove and save to ignite flare. Point away from face and body. Aim downwind.
3. In a downward motion, strike button on top of flare with abrasive surface on cap. Hold burning flare over side of boat. Do not wave overhead. Avoid breathing smoke.



WARNINGS:

AERIAL AND HANDHELD FLARES ARE FOR OUTDOOR EMERGENCY SIGNALING ONLY. THESE ARE NOT TOYS. MISUSE CAN RESULT IN DEATH/SERIOUS INJURY. SIGNAL LAUNCHERS LAUNCH BURNING FLARES AT HIGH VELOCITY. HANDHELD FLARES PRODUCE HOT FLAME AND/OR DENSE SMOKE. KEEP OUT OF REACH OF CHILDREN. KEEP AWAY FROM HEAT, SPARKS AND OPEN FLAMES. NEVER POINT LAUNCHER AT A PERSON, ANIMAL OR ANYTHING FLAMMABLE. NEVER STORE OR CARRY LAUNCHER LOADED. DO NOT LOAD LAUNCHER UNTIL IMMEDIATELY PRIOR TO USE. DO NOT USE WHERE PROHIBITED BY LAW. IT IS ILLEGAL TO IGNITE/FIRE DISTRESS SIGNALS IN A NON-DISTRESS SITUATION. THESE PRODUCTS ARE NOT INTENDED TO BE USED AS WEAPONS AND, IF USED FOR ANY PURPOSE OTHER THAN EMERGENCY MARINE SIGNALING, MAY SUBJECT USER TO CIVIL OR CRIMINAL ACTION INCLUDING UNDER LOCAL FIREARMS LAWS. STORE AERIAL AND HANDHELD FLARES ONBOARD UNDER COVER IN A SECURE, SAFE, DRY PLACE. READ AND FOLLOW ALL INSTRUCTIONS CAREFULLY.

IMPORTANT NOTICE

Orion USCG Approved signals are produced and independently tested to the specifications provided by the Code of Federal Regulations (CFR) 46, Part 160. Signal performance, however, can be negatively impacted if such signals are not stored properly. They must be stored under cover in a secure, safe, dry location on your boat and should be removed during long periods of boat storage. All signals and launchers should be inspected at least once annually for damage caused by exposure to moisture or mishandling.